THE CASE OF THE LATE ELECTION FOR THE COUNTY OF MIDDLESEX CONSIDERED.

THE CASE OF THE LATE ELECTION FOR THE COUNTY OF MIDDLESEX, CONSIDERED On the Principles of the Conſtitution, AND THE Authorities of Law.

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THE

CASE

Of the late ELECTION for the County of MIDDLESEX,

Examined on the PRINCIPLES of the CONSTITUTION,

And the AUTHORITIES of LAW.

THERE is a criſis, when, on certain ſubjects, the ſober remonſtrances of truth and reaſon, are of little avail againſt the miſguided impetuoſity of public prejudice.

Happily, however, an intemperance of this kind is generally as tranſient as it is violent; and, as its rage abates, the minds of the people become open to conviction.

There is a regard due even to the miſapprehenſions of the public: And no prudent Adminiſtration will be inattentive to what is called popular clamour.

Indeed the public opinion is ſeldom erroneous, when founded on juſt information: But removed, as the far greater part are, from the ſource of true intelligence, how eaſy is it for thoſe who have an intereſt in impoſing on the public, to miſlead them by falſe repreſentations, and alarm them with vain apprehenſions?

Impelled by ſuch miſtaken motives, how frequently have the people concurred in meaſures, which tended to defeat the very ends they had in view, and which were ultimately deſtructive of their own good?

But there is that juſtice and generoſity in the public, not always to be found in individuals. When the people, by candid and temperate arguments, are perſuaded that their opinions and apprehenſions are groundleſs, they are ready to renounce them, and to turn their reſentment againſt thoſe who have deceived and miſled them.

Later times ſcarce afford a ſtronger inſtance of miſapprehenſion, than that which poſſeſſes the minds of ſome perſons, with reſpect to the late important determination of the election for the county of Middleſex.

As few are acquainted with the true ſtate of this great conſtitutional queſtion, the writer of theſe ſheets, who has taken ſome pains to inveſtigate it, thinks it the duty of a good citizen, to ſubmit thoſe reaſons and authorities to the judgment of the public, which have brought conviction to his own mind.

To this end, he propoſes to ſhew from the Records of Parliament, and the Authorities of Law, that the Houſe of Commons is legally inveſted with the power they have exerciſed with reſpect to the late determination of the election for Middleſex.

Farther, that, on the general principles of reaſon and conſtitutional policy, they ought to have ſuch a power: And that, in the inſtance in queſtion, they have exerciſed their power in a juſt and conſtitutional manner, not only according to the law and uſage of parliament, but in ſtrict conformity with the adjudications in the courts of Weſtminſter, on ſimilar occaſions.

That the Reader may be the better able to judge of the arguments tending to prove theſe propoſitions, it will be neceſſary previouſly to ſtate the proceedings of the Houſe this ſeſſion, with reſpect to Mr. *Wilkes*; more eſpecially as the miſtakes and miſapprehenſions, which poſſeſs the minds of ſome, ariſe from the want of being acquainted with theſe proceedings, or of conſidering them with due attention and accuracy.

Mr. Wilkes, in the laſt parliament, was expelled from the Houſe of Commons. Being, moreover, by the verdicts of his country, convicted of crimes, for which infamous puniſhments have not unfrequently been inflicted, he thought proper to abſcond; ſo that ſentence could not then be paſſed upon him: Whereupon he was outlawed.

On the eve of the general election, he nevertheleſs appeared in public; and, though an outlaw, was elected one of the Knights of the Shire for the county of Middleſex. His outlawry however was afterwards reverſed, and ſentence was paſſed upon him; in purſuance of which, he was committed *in execution*, to the priſon of the King's Bench.

Being in this ſituation, he himſelf brought the conſideration of his particular circumſtances before the Houſe, by his own petition; which occaſioned them to call for the Records of the King's Bench, whereby the ſeveral convictions againſt him, and the ſentence paſſed thereon, appeared before the Houſe.

His petition having been heard and determined, he was afterwards charged with a new offence; that of writing a preface to a letter, which had been printed in the public papers: And, in the beginning of February laſt, being at the Bar of the Houſe of Commons, he confeſſed himſelf the author and publiſher of the preface under conſideration; which the Houſe then reſolved to be an inſolent, ſcandalous, and ſeditious libel: And afterwards came to the following reſolution;

" RESOLVED,
" That John Wilkes, Eſq; a member of this Houſe, who hath, at the " bar of this Houſe, confeſſed himſelf to be the author and publiſher of " what this Houſe has reſolved to be an inſolent, ſcandalous, and ſeditious " libel: And, who has been convicted in the court of King's Bench, of " having printed and publiſhed a ſeditious libel, and three obſcene and im- " pious libels, and by the judgment of the ſaid court, has been ſentenced " to undergo twenty-two months impriſonment, and is *now in execution* " under the ſaid judgment, be expelled this Houſe."

Whereupon it was

" ORDERED,
" That Mr. Speaker do iſſue his warrant to the Clerk of the Crown, to " make out a new writ for the electing a Knight of the Shire to ſerve in " this preſent parliament, for the county of Middleſex, in the room of " John Wilkes, Eſq; expelled this Houſe."

Mr. Wilkes, however, being nevertheleſs returned, the Houſe, on the 17th of February 1769, came to the following reſolution:

" RESOLVED,
" That John Wilkes, Eſq; having been, in this ſeſſion of parliament, " expelled this Houſe, WAS, and IS, *incapable of being elected* a member " to ſerve in this *preſent parliament*."

It appearing to the Houſe, that there was no other candidate at the laſt election, it was reſolved, farther, That it was a void election: And it was

" ORDERED,
" That Mr. Speaker do iſſue his warrant to the Clerk of the Crown, to " make out a new writ, for the electing a Knight of the Shire to ſerve in " this preſent parliament, for the county of Middleſex, in the room of " John Wilkes, Eſq; who *is* ADJUDGED *incapable of being* elected a mem- " ber to ſerve in *this preſent parliament*, and whoſe election for the ſaid " county has been declared void."

A great part of the Freeholders of Middleſex, however, being influenced by a miſtaken bias, obſtinately perſiſted in their choice, and Mr. Wilkes was again returned. Whereupon the Houſe *reſolved* the *Election* and *Return* of Mr. Wilkes, to be null and void; and, no other candidate appearing to the Houſe, they ordered a new writ.

At the next election, Mr. Wilkes, notwithſtanding the reſolutions of the Houſe, was again named as a candidate, and returned.

Whereupon the Houſe again reſolved the election of Mr. *Wilkes* to be null and void. But, it appearing to the Houſe that there were other candidates, they ordered the poll to be brought before them; and it appearing on the face of the poll, that, of the candidates capable of being elected, Mr. *Lutterell* had the majority, they *reſolved*, that Mr. *Lutterell* ought to have been returned, and ordered the return to be amended, by inſerting his name in the room of Mr. *Wilkes:* At the ſame time, they allowed the uſual liberty for any party to petition on the merits of the election.

In conſequence of this, fifteen Freeholders did prefer a petition; and on hearing the merits of that petition, the Houſe *reſolved*, that Mr. *Lutterell* was duly elected.

In order to ſhew that the Houſe of Commons is legally inveſted with the power they have exerciſed on this occaſion, it will be neceſſary to explain the nature and extent of the powers conſtitutionally veſted in that Houſe.

To preſerve the equal poiſe, which the jealouſy of our conſtitution has endeavoured to ſettle, the three orders of the ſtate are inveſted with ſeparate, as well as conjunct powers.

The power of Legiſlation is joint; and there can be no act of *Legiſlation*, which has not received the conſent of the *three Eſtates:* But beſides their *legiſlative* power, each Houſe has a *judicial* capacity, for the maintenance, among other purpoſes, of its own authority and independence. The Peers, in their Houſe, as Lord *Coke* ſays, have power of judicature, and the Commons, in their Houſe, alſo have power of judicature: And farther, as he adds, both Houſes together, have power of judicature *; and, for this, he refers to the Records of both Houſes.

The rule, and only rule, by which their power of judicature is directed, is the *Law of Parliament:* which, as will appear, is part of *the Law of the Land.*

* 4 Inſt. 23.

As every court of juſtice, ſays Lord *Coke* †, hath laws and cuſtoms for its direction, ſome by the common law, ſome by the civil and canon law, ſome by peculiar laws and cuſtoms, &c. ſo the *high court of Parliament ſubſiſts by its own proper Laws and Cuſtoms.*

It is declared by the Records of Parliament, that all weighty matters moved concerning the Peers of the Realm, ought to be determined, *adjudged* and diſcuſſed by the *courſe of Parliament*, and not by the civil law, nor yet by the common laws of the land, uſed in other courts of the realm ‡.

The ſame declaration, for the like reaſon, ſays Lord Coke, reſpects the *Commons*, for any thing done or moved in their Houſe: And this is the reaſon, he adds, why the *judges ought not to give any opinion of a matter of Parliament, becauſe it is not to be decided by the common law, but according to the law and cuſtom of Parliament*; *and ſo the Judges* (he concludes) *in divers Parliaments have confeſſed* *.

Thus it appears, not only from the ſeveral declarations of the judges of the Land, at different times, but from the authority of the Records themſelves §, that there is a *Law of Parliament*, which, in matters thereby cognizable, is diſtinct from, and independent of all other laws; but is, nevertheleſs, a branch of the *Law of the Land.*

The *Law of Parliament* is as much the *Law of the Land*, as the *Common Law*, or any other branch of the *general Law*, which governs in this realm. Lord *Coke*, enumerating the ſeveral branches of which the Law of the Realm conſiſts, mentions the *Law of Parliament* as ſecond in order.

Cooper, afterwards *Lord Cooper*, in his ſpeech in the caſe of *Aſhby and White*, ſays, the *Law and Cuſtom of Parliament is a part of the Law of the Land*, and, *as ſuch*, OUGHT TO BE TAKEN NOTICE OF BY ALL PERSONS.

Lord Chief Juſtice *Holt*, in his argument concerning the granting of a *Habeas Corpus* to the *Ailesbury men*, ſays, "*We are bound to take notice of the Cuſtoms of Parliament*, for they are a part of the *Law of the Land*; and there are the ſame methods of knowing it, as of knowing the law in Weſtminſter-hall.——In another place, he ſays, The *Law and Cuſtom of Parliament, is as much the Law of the Land, as any other law.*

† 4 Inſt. 14. ‡ 11 R. 2. n. 7.

* By the record of Parliament 31 H. 6. n. 27. the judges being conſulted concerning the releaſe of ſome members of the Commons, who had been impriſoned in the vacation, they anſwered, "That it was not their part to judge of the Parliament, which was Judge of the Law."

§ The Records of Parliament, as Lord *Coke* obſerves, are the trueſt hiſtories.

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The ſame language is held by *Hale*, *Petyt*, *Whitlocke*, &c. and will be found, in the courſe of theſe ſheets, to have been pronounced, from time to time, by the Courts of Juſtice. In ſhort, all who have ever written, or ſpoken on this ſubject, have treated the *Law of Parliament*, as part of the *Law of the Land*, and as a law which all perſons are bound to take notice of.

It is by this law, and by this only, that the Houſe of Commons regulate their proceedings, with reſpect to the various ſubjects of the juriſdiction they exerciſe.

The *Law of Parliament* may be conſidered as compoſed of two branches: 1. The rules, orders, cuſtoms, and courſe of the Houſe, with their expoſitions of, and deciſions upon the Law, with reſpect to matters within their juriſdiction.

The cuſtoms, courſe, and common judicial proceedings of a court, are the *Law of the Court*, of which the common Law takes notice, without alledging or pleading any uſage or preſcription to warrant them *.

That the courſe of any particular Court is a Law, and that the determinations of a Court make part of the Law of the Land has been held from the earlieſt times, ſo far back even as the Year Book of 11 E. 42 b.

Thus the rules, orders, and courſe of the *Houſe of Commons*, with their expoſition and deciſions on matters cognizable before them, are as much the Law of the Land, as the rules and orders of the Court of *King's Bench*, or any other Court, with *their* determinations, are the Law of the Land. Nay ſuch proceedings and deciſions of the Houſe of Commons, are in truth more binding than thoſe of the Courts at Weſtminſter, becauſe from the former there lies no appeal, and it is eſſential, as will be ſhewn, to the preſervation of Public Liberty, that no appeal ſhould lie.

2. The ſecond branch, compoſing the Law of Parliament, conſiſts of the *Statute Law* of the realm, ſo far as the ſame regards the Houſe of Commons, or the juriſdiction thereof.

It will not be material, on the preſent occaſion, to enquire into the various ſubjects over which the juriſdiction of the Houſe of Commons extends. It will be ſufficient, with regard to the queſtion now under conſideration, to

* 2 Rep. 53.

ſhew

ſhew not only from the authorities of the moſt ancient and reſpectable lawyers, but from the Records of Parliament *, that the Houſe of Commons—

1. Have the ſole and excluſive power of puniſhing their own members, *as ſuch*; either by commitment, ſuſpenſion, expulſion, or otherwiſe.

2. That they have the ſole and excluſive power of examining and determining the rights and qualifications of Electors and Elected, together with the returns of writs for the election of members, and in ſhort all matters incidental to ſuch elections.

1. As to their power of puniſhing their own members, by commitment, *Suſpenſion* †, or *Expulſion* ‡, &c. the inſtances of the exerciſe of thoſe powers are innumerable, and the occaſions on which it has been exerciſed are various.

With

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* The Journals of the Houſe of Commons are Records, and mentioned as ſuch 6 H. 8. c. 16.

† MEMBERS SUSPENDED.

Names.	*For what.*	*Time when.*
Mr. Payne,	For an offenſive ſpeech: and complained of as a purveyor, &c. Suſpended till the doubt be cleared, Whether he might ſerve.	3d April 1604.
Mr. Baber,	For granting warrants for billeting ſoldiers.—Suſpended during pleaſure,	9th April 1628.
Sir Jo. Jacob,	For monopoly.—Suſpended till his cauſe be heard,	21 Nov. 1640
Mr. Hollis,	For offenſive words.—Suſpended during that ſeſſion of Parliament,	26 April 1641
Mr. Phillips,	For ſitting in the pretended High Court of Juſtice, &c.—Suſpended till Committee report, and Houſe give judgment,	27th June 1661.
Mr. Love,	For not communicating——Suſpended till he bring certificate of having communicated,	3d July 1661.
Sir Wm. Penn,	For fraud and embezzlement.—Suſpended while impeachment depending againſt him,	21 April 1668.
Sir John Prettiman,	For impoſing on the Houſe, with regard to the protection of his ſervant Robert Humes.——Suſpended till he ſhall produce Robert Humes,	8th April 1670.
Mr. Culliford,	For ſeveral miſdemeanours.——Suſpended till he attend to anſwer,	8 March 1692.

‡ MEMBERS EXPELLED.

Names.	*For what.*	*Time when.*
Arthur Hall,	For a ſlanderous libel, derogatory to the authority of the Houſe, &c.	14th Feb. 1580.
Sir John Barnet,	For bribery, - - - - -	23d April 1621.
William Sandys, Sir Jo. Jacob, and Thomas Webb,	For monopoly, - - - - -	21th Jan. 1640.

Mr. Taylor,

With regard to commitments, their power will not be diſputed: But with reſpect to *Suſpenſions* and *Expulſions*, more eſpecially the latter, ſome, with what reaſon will be ſeen hereafter, have affected to call it in queſtion.

It appears from the liſt in the note underneath, that the Houſe have ſuſpended their members ſometimes during pleaſure, ſometimes till the member ſuſpended does a certain act, or till ſomething depending be determined; and, at other times, during that particular ſeſſion of Parliament: And the cauſes of theſe ſuſpenſions, it is ſeen, are as well for offences committed without the Houſe, as within it.

With reſpect to Expulſions, they are much more numerous than Suſpenſions. In the earlier times, before the parliamentary ſtile had acquired that accuracy which it has ſince attained, we find this ſentence variouſly expreſſed. Sometimes it is that the member be ſevered and cut off; ſometimes, that he be removed; at other times, that he be diſcharged, and at other times that he be put out; which are only ſo many ſynonimous expreſſions ſignifying Expulſion:—And the word *Expelled*, has for more than a century paſt been conſtantly uſed on theſe occaſions.

From the note underneath, the Reader will perceive the various cauſes for which this ſentence has from time to time been inflicted. Sometimes for offences againſt *Religion*, ſometimes for offences againſt the *State*, ſometimes for offences againſt *Morality*, and at other times for offences againſt the *Houſe* merely.

Mr. Taylor,	For words impeaching the juſtice of the Houſe, -	27th May 1641.
Mr. Benſon,	For ſelling protections, - - -	2d Nov. 1641.
Mr. Aſhburnham,	For receiving 500 l. from French merchants, -	22d Nov. 1677.
Mr. Sackville,	For aſperſing the king, - - -	25th March 1679.
Sir Francis Wythers,	For preſenting an addreſs to his Majeſty, expreſſing an abhorrency to petition his Majeſty for calling Parliaments,	29th Oct. 1680.
Sir Robert Peyton,	For ſecret negociation with the Duke of York, -	14th Dec. 1680.
Sir Hen. Furneſe,	For breach of duty, as truſtee for circulating exchequer bills under the 5 and 6 W. and M.	19th Feb. 1700.
Mr. Aſgill,	For being the author of a book, containing many *profane and blaſphemous* expreſſions	18th Dec. 1707-8.
Mr. Bodge,	For fraud as a contractor, - -	15th Feb. 1710.
Mr. Walpole,	For breach of truſt and corruption, -	17th Jan. 1711.
Mr. Steele,	For a *ſcandalous and ſeditious libel*, - -	18th March 1713.
Mr. Pryſe,	For a contempt of the Houſe, - -	23d March 1715.

For other inſtances, the Reader may refer to the Journals of 10 May 1571, 3 March 1620, 21 Jan. 1628, 21 Jan. 1640, 2 Feb. 1640, 27 May 1641, 30 Oct. 1641, 9 Dec. 1641, 2 Feb. 1641, 9 March 1641, 12 May 1642, 10 Aug. 1642, 11 June 1660, 21 April 1668, 1 Feb. 1677, 25 March 1679, 28 Oct. 1680, 13 May 1689, 12 March 1694, 26 March 1695, 1 Feb. 1697, 20 Feb. 1698, 22 Feb. 1698, 16 April 1701, 1 Feb. 1702, 19 Feb. 1711, 10 Jan. 1715, 22 Jan. 1716, 23 Jan. 1720, 28 Jan. 1720, 8 March 1720, and many others.

But

But however various the cauſes of Expulſion may have been, the effect of it is conſtantly the ſame: For, the *neceſſary* conſequence of Expulſion is, that the perſon expelled ſhall be incapable of being elected again to ſerve in the ſame Houſe of Commons that expelled him. This incapacity is implied in the very meaning of the word itſelf. Should any man of plain ſenſe, nay ſhould any young academician, or ſchool-boy even, be aſked what was underſtood by expelling a man from any ſociety, they would certainly anſwer, "The "meaning is, that he ſhall never be a member of *that* club, or of *that* college, "or of *that* ſchool any more."

Expulſion clearly, *ex vi termini*, ſignifies a total, and not a partial, excluſion from the ſociety or parliament from whence he is removed. If a member is excluded during pleaſure, or for a certain time only, that is, properly ſpeaking, a SUSPENSION, and not an EXPULSION: And the Houſe themſelves, as has been ſhewn, have made the diſtinction in many caſes, by making uſe of the word *Suſpended*, where they meant the excluſion to be temporary; that is, either during pleaſure, or for that ſeſſion, or till ſome end be attained. But when a member is *expelled*, he is not excluded from the meeting of that day, or of that ſeſſion, but from *that* Parliament; that is, from that body of which he is a member.

No one, acquainted with the conſtitution and practice of Parliament, will deny that the Houſe have a right to expel their own members. Indeed their right is eſtabliſhed by ſuch immemorial uſage, and has been exerciſed in ſuch a vaſt multiplicity of inſtances, that it is impoſſible to diſpute it.

It is not only evident from precedents, that the Houſe have a power of expulſion, but it is clear from the reaſon of the thing that they ought to have ſuch a power. Otherwiſe the moſt unworthy and unfit repreſentatives may ſit in Parliament, to the diſgrace and detriment of the nation. Since it is not pretended that any ſuch power is, or can be, lodged any where elſe.

But to admit their right of expelling, and argue that the member expelled may be re-elected that Parliament, is to contend for the groſſeſt abſurdity imaginable; it would expoſe the judicature of the Houſe of Commons to the moſt flagrant inſult and contempt; it would render the determination of the Houſe of Commons, totally nugatory, if the member whom they expelled to-day, ſhould be forced upon them again to-morrow. Should ſuch an extravagant abſurdity be once admitted, the determinations of the *Houſe of Commons*, which is a court of judicature, from whence there lies no appeal, would in fact become of leſs weight and authority than the loweſt court now exiſting.

No man therefore who means to argue ſeriouſly and candidly, will contend that a member expelled to-day, is capable of being elected the next day. For by whom is he expelled? Why by the People of Great Britain aſſembled by their repreſentatives.—And ſhall a part of the people, ſhall the electors of a particular county ſay,—We will not be bound by the judgment of the Majority—We will elect no other to repreſent us than the perſon expelled? Shall *they* be at liberty to reſtore him, who had no power to expel him? Certainly not.

Suppoſe, for the ſake of argument, that the people inſtead of being aſſembled by their repreſentatives, had been perſonally convened. Though in ſuch caſe every man would have a right of being preſent at an aſſembly where his own intereſt, among that of others, is in agitation, yet will any one ſay that he may not forfeit that right by indecorum, by treachery, by immorality, &c.? And are not the majority of the aſſembly the ſole judges of his fitneſs to continue a member? If they judge him incapable, may they not expel him? and can he ever acquire a ſeat in that aſſembly again, againſt the ſenſe of the majority?

It is the ſame where a member is expelled by the repreſentative body. They whom he repreſents have no power of obtruding him into the national aſſembly again, againſt the ſenſe of the majority. For it is to be obſerved, that though every member is choſen by a particular county or borough, yet, as is juſtly obſerved by Lord *Coke* and others, when in Parliament, he ſerves for the whole nation. Conſequently he ought not to ſit in Parliament, againſt the ſenſe of the majority in that nation, expreſſed by their repreſentatives.

If, for want of proper information, or due conſideration of the nature of the offence, the cauſe of expulſion ſhould not, in the apprehenſion of the electors, be ſufficient to warrant ſuch a puniſhment, yet they are nevertheleſs bound by the determination of the majority in the repreſentative body, to whom they have reſigned their right of private judgment in this inſtance, and who are, and, as will be ſhewn, ought to be the ſole judges in ſuch caſes.

Though the Houſe cannot, and God forbid they ever ſhould, ſay whom the electors ſhall chooſe, yet they may declare who by law are *not to be choſen*: And by expelling a member, they declare, without ſaying more, that he is incapable of being elected for that Parliament.

There cannot be a ſtronger inſtance that, in the general ſenſe of mankind, ſuch incapacity is the neceſſary effect of expulſion, than that of there having never been any attempt made to re-elect one in the ſame Parliament, out of the very many who have been expelled, except in the ſingle inſtance of

of *Robert Walpole*, Eſq; and then the Houſe, as will be ſeen, declared the effect of their vote of expulſion.

This caſe however has been cited on the other ſide, in order to deſtroy the inference, that the incapacity contended for is the neceſſary effect of expulſion.

But, from the bare ſtate of this caſe, it will manifeſtly appear that it proves the direct contrary of the propoſition it is cited to eſtabliſh.

Robert Walpole, Eſq; after having been expelled, was re-elected: Upon which the Houſe

" RESOLVED,
" That Robert Walpole, Eſq; having been, that ſeſſion of Parliament, " expelled the Houſe, *was*, and is incapable of being elected a member to " ſerve in that preſent Parliament."

Now, ſay they, the expulſion did not of itſelf render him incapable of being re-elected: If it had, there would have been no occaſion for ſuch a reſolution.

But they who advance this argument muſt certainly have read the reſolution inconſiderately, or they muſt argue againſt conviction. The very words of the reſolution, if they attend to them, clearly import that the incapacity was *created* by the *expulſion* itſelf. For what does the reſolution ſay? not ſimply that he *is* incapable of being elected, but that he WAS, and IS incapable &c. Was incapable! By what, and when? Why by the operation of the former vote of expulſion, and from the time when that reſolution paſſed. The ſubſequent reſolution does not *create* the incapacity, but (by the word *was*) refers to the incapacity already created, and (by the word *is*) declares that incapacity ſtill to have continuance. So that the laſt reſolution, not being confined to the time preſent, but referring to the time paſt, does thereby only explain and expound the meaning and *effect* of the former reſolution. Nothing therefore can be more abſurd than to urge an opinion from *Implication* only, contrary to that which is declared in *expreſs* words.

Still, however, it is ſaid that the incapacity of being elected is not a neceſſary conſequence of expulſion: And to ſupport this ſtrange propoſition, they cite another caſe of one Richard Woolaſton, who was expelled 20 February 1698, and was afterwards re-elected, and ſerved in that Parliament.

But this caſe, when it is examined, will by no means prove what it is cited to eſtabliſh. For though the Houſe, ſomewhat *inaccurately*, uſed the

word Expelled, yet when the cauſe of his *exclusion* is conſidered, it will appear that his incapacity was of a temporary nature.

The queſtion put at that time was, " That Richard Woolaſton, Eſq; be-
" ing a member of the Houſe of Commons, and having ſince been concerned
" and acted as a receiver of the duties upon houſes, and alſo upon births,
" &c. contrary to the act made in the fifth and ſixth years of his Majeſty's
" reign, &c. be expelled this Houſe." Which, upon a diviſion of 184 againſt 133, was carried in the affirmative.

Thus it appears, from the words of the reſolution itſelf, that the cauſe of diſqualification in this caſe was merely *temporary*; and the fact is, as appears upon record, that, at the time of his re-election, he no longer held that office: So that he was then unqueſtionably eligible.

Indeed the Houſe could never be preſumed to intend that the effect of their vote ſhould be *permanent*, when the cauſe, as declared by themſelves, was only *temporary*: For the cauſe of diſqualification ceaſing, the effect muſt ceaſe of courſe. But where the cauſe of expulſion is permanent, there the effect is permanent likewiſe, and muſt operate to exclude him from the body whence he has been expelled, ſo long as that body exiſts. No one therefore can pretend that this caſe is, in any reſpect, ſimilar to the principal caſe under conſideration.

As little will the caſe of *Sawyer*, which has been mentioned on the other ſide, ſerve to maintain the doctrine which it is cited to prove; that is, That a member expelled is eligible again in *that* Parliament. For, in truth, Sawyer was expelled juſt before the diſſolution of the Parliament, and he was not in fact elected again till the *ſubſequent* Parliament.

Upon the whole therefore, whether we conſider the obvious and common acceptation of the word Expulſion, or the natural inference to be drawn from the common uſage and courſe of Parliament, in ſuch caſes, it is manifeſt that the incapacity of being re-elected, is, and has always been conſidered as, a neceſſary effect of expulſion.

As there is no reaſon however to fear the force of any argument which can be urged againſt the proceedings of the Houſe in this caſe, let it be admitted for a while that expulſion does not of itſelf create an incapacity of being re-elected, yet ſtill it will appear that the Houſe of Commons, not only as expoſitors of their own reſolutions, but as expoſitors of the *common* and *ſtatute* law of the land, in caſes where their juriſdiction is competent, have a right to declare who are, and who are not eligible as members of Parliament. This leads to the conſideration of the next propoſition; which is —

2d,

2d, That they have the ſole and excluſive power of examining and determining the rights and qualifications of electors and elected, together with the returns of writs, and all matters incidental to elections.

Theſe rights they have aſſerted and exerciſed from time immemorial, and have, with a firmneſs to which we owe the liberties we now enjoy, withſtood and repelled all attempts made either by the Crown, the Peers, or the Courts of Law, to uſurp, or in any degree encroach upon, theſe great and conſtitutional points of juriſdiction.

Attempts of this kind have been made in various ſhapes; ſome, openly and directly; others in a covert and collateral manner. But that the Reader may judge for himſelf on a ſubject of ſuch importance, I will ſtate the moſt material conteſts relative to matters of juriſdiction, in a full and perſpicuous point of view, according to the order in which they occur.

The firſt time I ſhall take notice of when the Commons had occaſion to aſſert their right of juriſdiction, was in the *Norfolk* Caſe, the 29 Eliz. 1586, which is ſtated in *Cureze*, but more ſatisfactorily in *D'Ewes*'s Journal of the Houſe of Commons, and which was ſhortly thus:

The Sheriff of Norfolk received a writ, for the election of two Knights, but two days before the next county day. By reaſon of the ſhortneſs of time, he could neither ſummon many Freeholders, nor make due proclamation in the county, any one day before the election. The ſheriff, notwithſtanding, on the county day, proceeded to the execution of the writ, and Mr. Farmer and Mr. Greſham were duly choſen. After this a ſecond, and new writ, was delivered to the ſheriff for a new election, which was executed likewiſe, without any colour of misfeaſance; and thereby Mr. Heydon and Mr. Greſham were duly choſen: And the indenture of their election, with the writ, were delivered to the Clerk of the Crown, together with the writ and indenture of the former election.

The Lord Chancellor and the Judges, at a meeting held on the ſubject of theſe elections, held, that the firſt writ was well executed; that the firſt election was good, and the ſecond abſolutely void. Of this their reſolution they gave notice to the Houſe of Commons.

Whereupon the following points were reſolved by the whole body of the Houſe of Commons:

1. That the firſt writ was duly executed, and the election good, and the ſecond election abſolutely void.

2. That

2. That it was a moſt perilous precedent, that after two Knights of a county were duly elected, any new writ ſhould iſſue for a ſecond election, *without order of the Houſe of Commons itſelf.*

3. That the diſcuſſing and ADJUDGING *this*, and the *like differences*, ONLY, *belonged to the ſaid Houſe.*

4. That though the Lord Chancellor and Judges were competent judges in their proper courts, yet *they were not* in parliament.

5. That it ſhould be entered in the very Journal Book of the Houſe, that the firſt election was approved to be good, and that the Knights then choſen had been *received and* ALLOWED *as members* of the Houſe, *not out of any reſpect the ſaid Houſe had, or gave to the reſolution of the Lord Chancellor and Judges* therein paſſed, *but merely by reaſon of the reſolution of the Houſe itſelf*, by which the ſaid election had been approved.

6. That there ſhould be no meſſage ſent to the Lord Chancellor, not ſo much as to know what he had done therein, *becauſe it was conceived to be a matter derogatory* to the *power* and *privilege* of the ſaid Houſe.

Thus we find that the Houſe of Commons, even in theſe early days, were ſo juſtly jealous of their juriſdiction in theſe reſpects, that they reſolutely and explicitly aſſerted their *ſole right* of *adjudging this and the like differences:* And though they concurred with the Chancellor and the Judges, in their deciſion on the merits of this caſe, yet they were ſcrupulouſly careful to have it entered upon record, that they received and *allowed* the Knights as members, not out of any regard to the reſolution of the Chancellor and the Judges, but ſolely from their *own reſolution.*

The firm and ſpirited conduct which the Houſe of Commons diſplayed on this occaſion, is the more remarkable, as, during that reign, the dignity and privileges of that Houſe, were not always regarded with due conſideration.

Another attempt was made on the juriſdiction of the Commons in *Goodwin's* caſe, 1 James 1, printed in the Journals of the Houſe, and the 7th vol. of State Trials. This caſe was reprinted in the year 1704, by order of the Houſe of Commons, on occaſion of the famous debate on the *Ailesbury* election; which will be taken notice of in its order. The caſe of *Goodwin* was as follows:

Sir Francis Goodwin was elected Knight of the Shire of the county of Bucks; but the return of his election being made, it was refuſed by the Clerk

Clerk of the Crown: And the return of Sir John Forteſcue, who had been elected upon a ſecond writ, was entered. Whereupon the queſtion was put, after long debate,——" Whether Sir Francis Goodwin were lawfully elected and returned? which was reſolved in the affirmative."

Three days after, the Lords ſent a meſſage to the Commons, that there might be a conference about Goodwin's election: To which the Commons anſwered, " That they did conceive it did not ſtand in *Honour* and *Order* of " the Houſe, to give account of any of their proceedings and doings."

The Lords replied, that the King having been acquainted with what had paſſed in Goodwin's caſe, thought himſelf engaged in honour to have the affair debated again, and had ordered them to confer with the Commons upon it. Whereupon the Commons, by their Speaker, gave their reaſons to the King, why they could not admit of this innovation. But all they could obtain was, that, inſtead of a conference with the Lords, the King commanded them to confer with the Judges.

This mandate, to which the Houſe were extremely averſe, produced very warm debates. One member, with becoming ſpirit, obſerved, " That " by this courſe the free election of the country was taken away, and none " would be choſen but ſuch as pleaſed the King and Council. Let us " therefore," ſays he, " with fortitude, underſtanding and ſincerity, ſeek " to maintain our *privilege;* which cannot be conſtrued any contempt in " us, but *merely a maintainance of our* COMMON RIGHT, which our anceſ- " tors have left us, and it is juſt and fit for us to tranſmit to our poſ- " terity."

Another member ſaid, boldly, " This may be called a *quo warranto* to " ſeize our Liberties.---Our hands were never fought to be cloſed before. " It opens a gap to thruſt us all into the petty bag. A Chancellor may " call a parliament of what perſons he will by this courſe. Any ſuggeſtion " may be cauſe of ſending a new writ. Judges cannot take notice of pri- " vate cuſtoms or privileges: *But we have a privilege which ſtands with* " *the law.*"

At length, the queſtion being put, Whether they ſhould confer with the Judges? It was carried in the negative, by a general voice, *No conference.*

In the end, a committee was appointed to prepare anſwers in writing, to the four objections which the King had made to the reaſons urged by the Speaker. As the third and fourth objections do not apply to the preſent purpoſe, it will be ſufficient to take notice of the firſt two.

Objection 1. " That we aſſume to ourſelves power of examining of the elections and returns of Knights and Burgeſſes, which belongeth to your Majeſty's Chancery, and not to us: For, that all returns of writs were examinable in the courts wherein they were returnable; and the parliament writs being returnable into *Chancery*, the returns of them muſt needs be there examined, and not with us."

Our humble anſwer is, that until the 7th year of King Henry the 4th, all parliament writs were returnable into parliament, as appeareth by many precedents of record, and conſequently the returns there examinable.

Although the form of the writ be ſomewhat altered by this ſtatute, yet *the power of the parliament to examine and* DETERMINE *of elections* remaineth; for ſo the ſtatute hath been always expounded ever ſithence, by uſe to this day: And for that purpoſe, both the Clerk of the Crown hath always uſed to attend all the parliament time, upon the Commons Houſe, with the writs and returns: And alſo, the Commons, in the beginning of every parliament, have ever uſed to appoint ſpecial committees, all the parliament time, for examining controverſies concerning elections and returns of Knights and Burgeſſes; during which time the writs and indentures remain with the Clerk of the Crown; and after the parliament ended, and not before, are delivered to the Clerk of the petty bag in chancery, to be kept there; which is warranted by *reaſon*, and *precedents*. By *reaſon*; for, that it is fit that the *return ſhould be in that place examined, where the appearance and ſervice of the writ is appointed:* By *precedents*; of which they cited many, too tedious to be here enumerated, and then conclude, that,— " Uſe, reaſon and precedents do concur to prove, the *Chancery* to be a place " appointed to receive the returns, as to keep them for the parliament, but " not to judge of them: And the inconvenience might be great, if the " *Chancery* might, upon ſuggeſtion, or Sheriff's returns, ſend writs for " new elections, and thoſe *not ſubject to examination in parliament:* For, ſo, " when fit men were choſen by the counties and boroughs, *the Lord Chan-* " *cellor, or the Sheriffs, might diſplace them, and ſend out new writs, until* " *ſome were choſen to their liking.*"

Objection 2. That we dealt in the cauſe with too much precipitation, not ſeemly for a council of gravity, and without reſpect to your moſt excellent Majeſty, who had deſired the writ to be made: And, being but half a body, and no court of record alone, refuſed conference with the Lords, the other half, notwithſtanding they prayed it of us.

Our humble anſwer is, to the precipitation, That we entered into this cauſe, as in other parliaments of like caſes hath been accuſtomed; calling to us the Clerk of the Crown, and viewing both the writs, and both the returns;

returns, which hath been warranted by continual uſage among us.

Concerning our refuſing conference with the Lords, there was none deſired, until after our ſentence paſſed; and then we thought, That, *in a matter private to our own Houſe*, which, by rules of order, might not be by us revoked, we might, without any imputation, refuſe to confer. Yet, underſtanding, by their Lordſhips, that your Majeſty had been informed againſt us, we made haſte to lay open, to your Majeſty, the whole manner of our proceeding; *not doubting, though we were but part of a body, as to* MAKE NEW LAWS, *yet, for any matter of privileges of our Houſe, we* ARE, AND EVER HAVE BEEN, A COURT OF OURSELVES, *of ſufficient power*, " *to* " *diſcern and* DETERMINE, *without their Lordſhips, as their Lordſhips* " *have uſed always to do for theirs, without us.*"

In return to this, the King replied, that he had ſeen and conſidered of the manner and the matter: He had heard his *judges* and his *council*; and that he was now *diſtracted in judgment*. Therefore, for his farther ſatisfaction, he deſired, and commanded, *as an abſolute King*, that there might be a conference between the Houſe and the Judges.

This unexpected meſſage occaſioned great amazement in the Houſe, but, at length, it was propoſed to petition the King, that he would be pleaſed to be preſent at the conference himſelf. This diſputatious Monarch gladly accepted the propoſal, and ſaid that he would be preſident himſelf.

At this conference, the King acknowledged, that the *Houſe of Commons* was a court of record, and a judge of returns. At length this conference produced a kind of compromize. It was agreed, that both the members ſhould be excluded, and that a new writ ſhould iſſue; to which the Commons with difficulty conſented, at *Goodwin's own particular deſire*, expreſſed in a letter from him to the *Speaker*, which was read before the queſtion was put, and wherein he preſſed the Houſe to conſent to the propoſition, chuſing rather to wave his right than be the occaſion of a quarrel between the King and the Commons.

Nevertheleſs, many members were greatly diſſatisfied, even with this conceſſion. It was ſaid by one,—" We loſe more at a parliament, than we " gain by a battle. The authority of the Committee was only to fortify " what was agreed on by the Houſe for anſwer, and they had no authority " to conſent."

It was further urged by another, in theſe terms;——" We ſhould pro- " ceed to take away our diſſention, and preſerve our liberties: We have " exceeded our commiſſion, and drawn upon ourſelves a note of inconſtancy " and levity."

Thus we ſee, that, even in theſe ſpiritleſs days, when the Sovereign exerted himſelf in the higheſt tone of prerogative, the Commons boldly aſſerted their right of juriſdiction; and the King perceived, by the temper and arguments of the Houſe, that he had no proſpect of becoming, as he intended, maſter of elections.

Rapin very juſtly repreſents this attempt of the King's, as an evidence of his aiming at abſolute power: And it may be added, that had he ſucceeded to his wiſh in this attempt, it would have enabled him to aſſume that *abſolute* power in *fact*, which he arrogated in *words*.

No veſtige, from this time, I believe, appears, where the excluſive juriſdiction of the Houſe of Commons, with reſpect to elections and matters incidental thereto, came in queſtion, till juſt before the reſtoration, in the caſe of *Nevil* againſt *Stroud* †; which was an action on the caſe brought in the Common Pleas, againſt the defendant, as Sheriff of *Berkſhire*, for a falſe return. The record was delivered into parliament, and was afterwards, by order of parliament, adjourned into the Exchequer Chamber ‡, but was never determined. It was nevertheleſs ſtrongly urged in this caſe, "*That* "*as it concerned parliamentary privilege, the Common Law could not inter-* "*meddle with it.*"

I the rather mention this, becauſe the Courts of Law adopted this opinion in caſes I ſhall hereafter take notice of.

In the year 1672, the Commons were again under the neceſſity of aſſerting their juriſdiction. When the Earl of *Shaftſbury* was Lord Chancellor, writs iſſued, during a prorogation of parliament, for electing members in the room of thoſe that were dead: The King himſelf was ſo cautious, as to the regulating of this proceeding, and had ſo much regard to the privileges of the Houſe of Commons, that, at the next ſeſſion of parliament, 5th of February 1672, he ſpoke to the Houſe of Commons from the throne in theſe words:

"One thing I forgot to mention, which happened during this prorogation; I did give orders for the iſſuing ſome writs, for the election of "members, inſtead of thoſe that are dead; that the Houſe might be full "at their meeting: And I am miſtaken, if this be not according to former "precedents. But I deſire you will not fall to other buſineſs, till you have "examined that particular; and, I doubt not, but precedents will juſtify

† 2 Sid. 168.

‡ It was uſual, about this time, for committees of the Houſe of Commons to meet in the Exchequer chamber.

"what

" what is done: I am as careful of all your privileges as of my own pre-
" rogative."

The 6th of February 1672, the Houſe of Commons took the matter into conſideration; and ſeveral precedents being cited, and the matter at large debated, and the general ſenſe and opinion of the Houſe being, that, during the continuance of the High Court of Parliament, the right and power of iſſuing writs for electing members to ſerve in this Houſe, in ſuch places as are vacant, is in this Houſe, who are the proper judges alſo of elections and returns of their members.

Thereupon it was *Reſolved*, " That all elections, upon the writs iſſued ſince the laſt ſeſſion, are void: And that Mr. Speaker do iſſue his warrant to the Clerk of the Crown, to make out new writs for thoſe places." Which was done accordingly.

Not many years after, that is, in the 26 Car. 2. an attempt was made to encroach on the excluſive privilege of the Houſe in matters of election, by endeavouring to eſtabliſh a concurrent juriſdiction, in the caſe of *Barnardiſton* againſt *Soame* *.

This was an action on the caſe brought in the *King's Bench*, againſt the defendant, as Sheriff of Suffolk, for a double return. The election of the plaintiff had, upon examination in parliament, been judged good, and they had committed the defendant for making this double return. Nevertheleſs, the jury found a verdict for the plaintiff, with 800 *l.* damages.

It was moved however in arreſt of judgment, that the action did not lie; and, among other reaſons, it was urged, " *That the falſity or verity of the* " *return was only examinable in the Houſe of Commons*, who *are the* SOLE " JUDGES, and will puniſh ſuch falſities, as they have done in the preſent " caſe."

Judgment however was given for the plaintiff.

Lord Chief Juſtice *Hale*, in this caſe, bid all perſons about him take notice, that, *they did not determine the right of election, for the* JUDGMENT *in that caſe belonged to Parliament*; but, he ſaid, *ſince the Houſe of Commons have determined the right, he thought they might follow their judgment, to repair the plaintiff in* damages.

This judgment, nevertheleſs, was afterwards reverſed in the Exchequer Chamber, by the opinion of Chief Juſtice *North*, and five other judges, againſt two; the Chief, with the five other judges, holding, that the action

* 2 Lev. 114. Pollex 470. 3 Keb. 365, 369, 389, 664. 7 St. Tr. 428.

did not lie: And this judgment of reverſal was afterwards affirmed in the Houſe of Lords *.

After ſuch a ſolemn reverſal of the judgment of the King's Bench, and an affirmative of that reverſal in the Houſe of Lords, it might have been expected that this point would never be moved again. Yet in the 33 Car. 2. it came again in diſpute in the caſe of *Onſlow* againſt *Rapley* †; which was an action on the caſe brought againſt the defendant as returning officer, for a double return, and a verdict thereupon for the plaintiff. But, upon motion in arreſt of judgment, it was held clearly by the whole court, that the action did not lie. They were unanimous *that they had no juriſdiction of this matter*; and went ſo far as to ſay, "That it would be great preſumption in "the court to meddle with elections to Parliament, before the matter hath "been determined in Parliament."

Sometime after the reſolution, in the 12th Wm. 3 ‡, a farther attempt was made, in a caſe ſomewhat different from the laſt, to give the courts of law a concurrent juriſdiction with the Houſe of Commons.

This was in an action on the caſe brought in the *Common Pleas*, by *Prideaux* againſt *Morrice* §, for a *falſe* return, before a determination in Parliament, and the court were clearly of opinion that ſuch an action did not lie.

In this caſe, Chief Juſtice Trevor delivered the opinion of the court in the following words:

"That this action would not lie before the election was determined in "Parliament, *which was the proper court to determine this matter*. If it "ſhould lie, this inconvenience might follow, viz. The verdict might find "contrary to what the Parliament might hereafter determine, which is not "to be allowed; for it is plain that, *if the Parliament had determined "againſt the plaintiff, he could never afterwards have this action.*"

"It is true, in courts which have concurrent juriſdictions, there cannot "be different judgments in one and the ſame caſe; becauſe the determina-"tion muſt be in that court, which was firſt poſſeſſed of the cauſe, for if an "action is brought for the ſame matter in one court, the party may plead in "the abatement, that it is depending in another; and if judgment is given "in the firſt action, then he may plead it in bar to the laſt."

* 1 Lutw. 89. † 3 Lev. 29. 2 Vent. 37.

‡ I take no notice of the caſe of *Norris* againſt *Mawdit*, as that was an action for a falſe return, grounded on the ſtat. 23 A. 6. c. 15. and does not apply to the queſtion under conſideration. See 5 Mod. 511. Comb. 430.

§ 1 Lutw. 82. Nelſ. Lutw. 31. Salk. 502. Holt 523. 8 St. Tr. 9.

But,

But, in this caſe, there may be different judgments, BECAUSE THE COURT OF PARLIAMENT HAVE A SUPERIOR JURISDICTION IN THIS MATTER *.

A writ of error was brought upon this judgment in the Court of *King's Bench*, and the judgment was there affirmed.

Nevertheleſs, ſuch is the contentious ſpirit which has at all times attended elections, and ſuch the animoſity with which each party oppoſes the other, that the excluſive right of juriſdiction of the Commons, in theſe matters, did not long remain uncontraverted, but came again in queſtion, in the famous caſe of *Aſhby* againſt *White*, and others †, in the 2d Ann.

This was an action upon the caſe brought againſt the defendants, as conſtables of *Ailesbury*, for refuſing to receive his vote in the election of two burgeſſes for that borough. A verdict was found for the plaintiff, and it was afterwards moved in arreſt of judgment, that the action was not maintainable; and it was held, by the opinion of three judges, againſt *Holt* Chief Juſtice, that the action did not lie.

In the end, however, this judgment was reverſed, upon an appeal to the Houſe of Lords; and judgment was given for the plaintiff.

But the Commons warmly reſented this attempt to deſtroy their independence ‡, and ſuch violent diſputes aroſe between the two Houſes, that it was judged proper to put an end to them by proroguing the Parliament.

The higheſt reverence, no doubt, is due to the judgment of that ſupreme court of judicature, the Houſe of Lords; but an inſatiate appetite for power is natural to all bodies of men; and if the judgment of that auguſt aſſembly may be preſumed to have leſs authority in one caſe than another, it muſt certainly have the leaſt weight in this, wherein their judgment directly tended to enlarge their own juriſdiction, and ultimately to give them a manifeſt aſcendency over the third eſtate in the kingdom, and conſequently over the Liberties of the people of Great Britain.

It muſt be premiſed likewiſe, that great deference is undoubtedly due to the opinion of that eminent Chief Juſtice, Lord *Holt*; at the ſame time it muſt be acknowledged, that the three judges, from whom he differed, have ever been reputed among the moſt learned and able of the profeſſion: And perhaps ſome

* The report of this caſe in the French edition of Lutw. 89. is to the ſame effect: But the Chief Juſtice is there made to ſay further, "*That the Houſe are the proper judges.*"

† Salk. 19. 3 Salk. 17. 6 Mod. 45. Holt 524. 8 St. Tr. 89.

‡ They voted it a breach of the privilege, and committed all the parties concerned, lawyers, &c.

of the arguments § of this great man, on this occaſion, will be found to depend on thoſe hair-breadth diſtinctions, which, however they may ſhew the ſubtlety of argumentation, do not always tend to the eſtabliſhment of truth.

It is to be premiſed, that it was agreed in this caſe that the burgeſſes, for whom the plaintiff tendered his vote, were elected. Nevertheleſs Lord Holt, in giving his opinion, ſaid, That it was not material whether the candidate, for whom he would have voted, be choſen or not.

In this, however, he ſeems to loſe ſight of the ſubſtantial merits of the queſtion. For what is the *end* for which the *right* in *queſtion* was eſtabliſhed? No other than this: That certain perſons, *being duly qualified*, ſhould have the privilege of electing whom they pleaſe, *being duly qualified likewiſe* to repreſent them in the great council of the nation.

If therefore the perſon for whom they tendered their vote be received, the ſubſtantial *end*, for which the privilege was granted, is obtained; ſo that they cannot alledge any injury; and though their votes may have been rejected, yet they are not thereby deprived of their *right*. They may tender their votes on any other occaſion, and there can be no danger, that, by the rejection of their votes by the returning officer at one time, any perſon, not of their choice, ſhould, at any ſubſequent election, be choſen their repreſentative: for it is at all times open to them to aſſert their right by petition to the Houſe of Commons, where, if well founded, it will be allowed and confirmed; and their votes, if neceſſary to give a majority to the candidate of their choice, will be added to the poll.

But, ſays Lord Holt, "by refuſing the plaintiff's vote, he has an injury done him, for which he ought to have a remedy: Want of right and want of remedy are reciprocal. Wherever there is injury, it imports a damage. The Parliament cannot judge of this injury, or give damages to the plaintiff.

That the Houſe of Commons cannot give damages, *eo nomine*, as damages, may be admitted; but does it therefore follow, that they cannot judge of the injury, and give a remedy?

His Lordſhip very properly ſlights the notion, that there can be no *damage* but a pecuniary one. But is it not equally exceptionable, to contend, that there can be no other kind of *remedy* but a pecuniary one?

§ In truth, the moſt material arguments urged by Lord *Holt*, in this caſe, were ſtrongly preſſed before by Sir Robert *Atkins*, and over-ruled in the caſe of *Barnardiſton* againſt *Soames*. See 7 St. T. S. 434 & ſequent.

Undoubtedly

Undoubtedly there may; and the *remedy* is, to petition the Houſe of Commons, who will examine and determine the matter of *right*, and thereby judge of the *injury*, and puniſh the offender.

No, ſays his Lordſhip; there can be no petition in this caſe. "Was "ever ſuch a petition heard of in parliament, as that a man was hindered "of giving his vote, and praying them to give him a remedy?"

To this it may be anſwered, That, as his Lordſhip very properly obſerved, in this caſe, that it was no objection to the bringing the action, that no ſuch action was ever brought before, ſo it might have been urged, that it could be no objection againſt the preferring of ſuch a petition, had no ſuch petition ever been preferred before.

As the Houſe of Commons, only, have competent juriſdiction, with reſpect to the rights of election, ſo every invaſion of thoſe rights muſt, at all times, have been cognizable before them: It was urged, as to this point, by a member, in the courſe of the debate in the Houſe of Commons, that he had known petitions touching elections preferred by very few perſons; by the ſame rule, ſaid he, a petition may be preſented by *one*: And in truth it appears from the Journals of the Houſe of Commons, of the 31ſt of May 1628, that this doctrine was expreſsly laid down.

At that time, there was a queſtion with reſpect to *Warwick*, whether the election ſhould be made by the Mayor and Common Council, or by the Commoners in general. And a petition was produced, whereby above 200 Commoners diſclaimed to have any right of Election. But the petition was refuſed, and the reaſon alledged, was, "becauſe, if *one* Commoner ap-"pear to ſue for his right, we will hear him."

And in truth ſeveral petitions have, of later years, been preſented, merely to aſcertain the right of voting, where there was no queſtion about the merits of the election.

In the year 1711, which was ſoon after the caſe of *Aſhby* againſt *White*, a petition was preſented by *William Treene* and others, of the city of *Coventry*, complaining of their being debarred of their undoubted right of voting, and praying that their right of voting may be aſcertained to them, and *reparation* made for the *injury* they have ſuſtained in being denied the ſame.

They were heard by their council, and their right was eſtabliſhed.

Again, in 1723, a petition was preferred by *Charles Webb*, and others, of the borough of *Calne* in *Wilts*, complaining that their votes were refuſed at the laſt election.

They were heard by their council, who *admitted that the ſitting members were duly elected, and juſtly returned:* ſo that the merits of election, it is ſeen, were not in conteſt, but the right of voting in the petitioners was, as an abſtract propoſition, the only queſtion before the Houſe. In the end, their right was diſallowed.

In 1724, another petition was preſented from the inhabitants and houſe-keepers of the borough of *Honiton*, in the county of *Devon*, ſtating that they had and enjoyed an undoubted right of voting, till 1711, when the Houſe determined the right of election to be in the inhabitants paying ſcot and lot only: That the returning officers, ſince that time, had refuſed their votes: That the petitioners would have voted for the then ſitting member, *had there been any poll*, and did deſire to ſign the return, but were refuſed as formerly: and prayed relief; which was granted them, by eſtabliſhing their right.

From theſe inſtances, it appears that petitions have been preferred to Parliament, merely to ſubſtantiate the right of voting in the elector, as an abſtract queſtion, where there was no diſpute whatever about the right of the elected, where there was no conteſt about the election, or the return, and, in the laſt inſtance above ſtated, *where there was no poll even.*

There is no room therefore for Lord *Holt*'s apprehenſions, that there may be a right without a remedy: as the right concerns the Parliament, ſo the remedy is to be had there only. They only can give the *ſpecific thing* withheld: For ſhould a court of law recognize the right of voting, yet they cannot add the voter's name to the poll. The Houſe only can reſtore him to the *ſpecific right* which has been refuſed.

It is too much to ſay that every injury imports damage. There are many caſes where the law only gives the ſpecific thing contended for, without damages, as in caſes of *mandamus*, &c. Nay the common law paid ſo little attention to damages, that, in ſeveral inſtances, damages were not recoverable upon real actions; and coſts were not recoverable in any caſes whatever at common law.

Beſides his Lordſhip takes for granted the very thing in diſpute, when he ſays, that by refuſing the plaintiff's vote, he has an injury done him. For the *refuſal* can be no injury, unleſs the *right* of voting be firſt eſtabliſhed; and that, as has been ſhewn, the verdict of a jury cannot do. The Houſe of Commons only, are the competent judges of the rights of election, and the legality of votes. Their juriſdiction in theſe caſes is part of the law of the land, which has been recognized by ſeveral acts of Parliament*, de-

* 7 & 8 W. 3. c. 7. 2 Geo. 2. c. 24.

claring

claring that "*ſuch votes ſhall be deemed to be legal which have been ſo declared by the laſt determination* IN THE HOUSE OF COMMONS, *which laſt determination ſhall be final.*"

Perhaps, indeed, after the right of voting has been determined in the Houſe of Commons, an action at law may, as was hinted by the other judges, be maintainable for the recovery of the coſts, incurred in the proſecution of the right. But to contend that an action lies before ſuch determination, is to introduce the inconvenience which Lord *Trevor* ſo ſtrongly inſiſted upon. For ſhould an action be brought againſt a returning officer for refuſing an elector's vote, this would not ſtop the proceedings of the Houſe of Commons upon a petition: And ſhould a verdict be found by a jury, with damages againſt the returning officer for the refuſal, and judgment be given thereon, the Houſe might afterwards determine on the petition, that he had no right of voting, and might puniſh the officer for admitting his vote. So that on one hand, he might be puniſhed by the court of law for refuſing the defendant's vote; and he might be puniſhed on the other hand, by the Houſe of Commons, for admitting it: which would be ſuch a groſs abſurdity, and ſuch a ſcandal to juſtice, as the laws of no country can be ſuppoſed to countenance, and which the laws of this country do not countenance; for, by the ancient Law of the Land, recognizable by act of Parliament, rights of this nature can only be determined in the Houſe of Commons.

A farther attempt to give the courts of law a concurrent juriſdiction with the Houſe of Commons, with reſpect to elections, was made in the caſe of *Kendal* againſt *John*† the 5th *Ann.*

This was an action in the caſe againſt the defendant for a falſe return: and after a verdict for the plaintiff, it was moved in arreſt of judgment, that the action did not lie; and the judgment was arreſted, by the unanimous opinion of the court, who held that no action would lie.

In this caſe, among other arguments, it was urged, that the right in queſtion was a *parliamentary right*; That the *remedy* therefore *muſt be parliamentary*, and could be had no where elſe but in Parliament.

It was ſaid farther that THE COURT WOULD JUDICIALLY TAKE NOTICE OF THE LAW OF PARLIAMENT; that IT WAS THE LAW OF THE LAND: and, according to Lord *Coke*, OUGHT TO HAVE PRECEDENCY.

† Holt 629, &c. Forteſc. 104: And ſee the S. C. by the name of Coundell againſt John, Salk. 504.

Another reaſon aſſigned why there was no cauſe of action was, *That the plaintiff had had the* EFFECT *of his election*; that he was returned, and had his place; there was nothing remaining wherein he could pretend himſelf injured, but the coſts he had been at in the proſecution, and as to them it ought to be ſuppoſed *that the Houſe conſidered them.*

In ſhort, Lord Chief Juſtice *Holt* himſelf, in delivering his opinion, ſaid,—"The proper remedy is in the Houſe of Commons; and we cannot meddle "with it; but they can cauſe returns to be altered, and then they become the "ſame as if the perſon was originally returned."

Thus it appears, from the foregoing hiſtorical deduction, that every attempt which has been made to encroach on the excluſive juriſdiction of the Houſe of Commons, in matters of election, either with reſpect to electors or elected, has either dropped of itſelf, or been reſolutely withſtood and repelled by the Houſe of Commons; who have conſtantly, as they did in the caſe of *Goodwin*, aſſerted and maintained this juriſdiction, as their COMMON RIGHT, which they derived from their anceſtors.

As to their right of deciding with reſpect to the qualifications of the *elected*, that has not, in any of the caſes, been diſputed. Even Sir Robert *Atkins*, who, in the caſe of *Barnardiſton* againſt *Soame*, contended moſt ſtrenuouſly for affirming the judgment, ſaid, "*We know that the Houſe of* "*Commons is now poſſeſſed of the juriſdiction of determining all queſtions concern-*"*ing the election of their own members, ſo far at leaſt, as in order to their* "*being admitted or excluded from ſitting there.*"

Nay, in the caſe of *Aſhby* againſt *White*, neither Lord *Holt*, nor any of the zealous Whigs of thoſe days, ventured to diſpute that the juriſdiction of the Houſe was fully competent, *as to the ſeats of their own members.* One of the Lords, at a conference, ſaid, "We do not meddle with the Commons "right to determine their own elections; they have a ſettled poſſeſſion of it, "which is a right." So that the caſe of *Aſhby* againſt *White*, though cited on the other ſide, concludes ſtrongly againſt the doctrine they labour to introduce.

Nevertheleſs they contend, that the right of being elected is a *common law* right, of which no man can be deprived, but by act of Parliament.

This, in the firſt place, is aſſuming a propoſition for granted, which may ſafely be denied. The right, as was ſaid, in the caſes above cited, is a *parliamentary right*, to be exerciſed only in Parliament, and therefore cognizable there only, where the duty is to be executed.

Beſides,

Beſides, none can ſay that, in the preſent inſtance, Mr. *Wilkes*'s right of being elected is taken away; for in truth it is only *ſuſpended* during the exiſtence of this parliament. When the body which expelled him is diſſolved, his capacity of being elected revives. The incapacity is not perpetual, but only temporary. To make it perpetual, is what, in the better opinion perhaps, an act of Parliament only can do. But the Houſe of themſelves can diſqualify any member during that Parliament. For let the right be a common law right, or a parliamentary right, yet, like other rights, it may be forfeited by crimes and miſdemeanours, &c. And who ſhould judge of thoſe cauſes of forfeitures, but the body of which he is a member?

Indeed, the right of juriſdiction in the Houſe of Commons, in this reſpect, is ſo fully eſtabliſhed by immemorial uſage, that it cannot be diſputed, without contraverting the fundamental principles on which the Law of the Land depends. The Houſe, as appears from their Journals, have determined with reſpect to the qualifications of the *elected*, from time to time, down from the year 1553, to the preſent period: and it is by their *reſolutions* only, that perſons of various claſſes are at this day diſqualified. It is by their reſolutions, that—

1. *Clergymen* are not eligible.

The 12th October 1553, a committee was appointed to enquire about the right of *Alexander Newell* and *John Foſter* to ſit in the Houſe: and the committee reported that Alexander Newell being Prebendary of Weſtminſter, and thereby having a voice in the Convocation Houſe, cannot be a member of this Houſe: which was agreed by the Houſe, and a writ was directed for another burgeſs in his place.

We find the like reſolutions the 8th February 1620, and the 17th January 1661, with reſpect to other clergymen.

2. Judges are not eligible.

"The 28th June 1604, it was moved by Sir Edward Hobbes, as a doubt "to be reſolved, Whether if a member of this Houſe be called to the place "of a *Judge*, or other *attendance above*, during the time of Parliament, he "ought to ſit here during the ſame Parliament."—We do not find any reſolution on this point, at that time. But on

The 9th November 1605, the committee having reported two members to be attendants as *Judges*, in the higher Houſe, the queſtion was put on the

 report,

report, Whether they ſhould be recalled; and the Houſe *reſolved*, That they ſhould *not*.

Accordingly we meet with ſeveral paſſages in the Journals, particularly the 11th April 1614, where the excluſion of the Judges is ſpoken of as an eſtabliſhed practice; and we ſee, by daily experience, that whenever any members of the Houſe of Commons are appointed Judges, new writs are iſſued for the election of others in their room; of which the numerous precedents are ſo notorious and recent, that it is needleſs to refer to them.

3. *Returning Officers* are not eligible.

The 25th June 1604, upon a motion of Mr. *Moore*, to know the opinion of the Houſe, whether the Mayor of a town, &c. might lawfully be returned, and ſerve as a member?

The Houſe *reſolved* and ordered, and the clerk of the Houſe was commanded to enter it accordingly, that from and after the end of this preſent Parliament, no Mayor of any city, borough, or town corporate, ſhould be elected, returned, or allowed to ſerve as a member of this Houſe, and if it did appear that any member was returned a burgeſs, that preſently a new writ ſhould be awarded, for the choice of another in the room and place of the ſaid Mayor.

The 14th April 1614, upon a report of the committee, that Mr. *Berry*, bailiff of Ludlow, had returned himſelf.

The Houſe *reſolved*, That he ſhould be removed, and a new choice made: —And, *Reſolved* farther, That all Mayors, and Bailiffs, in the like caſe, ſhould be removed.

Accordingly, 22d May 1621-2, we find, that a Mayor being returned, he was removed, and a new writ ordered. And, on

The 2d June 1685, The Houſe reſolved, That no Mayor, Bailiff, or other Officer of a Borough, who is the proper officer to whom the precept ought to be directed, is capable of being elected to ſerve in Parliament for the ſame borough of which he is Mayor, Bailiff, or Officer, at the time of the election.

4. *Aliens* are not eligible.

The 28th May 1624, *reſolved*, upon the queſtion, That the election of Mr. *Walter Stewart*, being no natural born ſubject, is void: and a warrant to go for a new writ for Monmouth.

5. The eldeſt ſons of Scotch Peers are not eligible.

The

The 3d December 1708, A motion being made, and the queſtion put, "That the eldeſt ſons of the Peers of *Scotland* were capable, by the laws of "Scotland at the time of the Union, to elect or be elected as commiſſioners "for ſhires or boroughs to the Parliament of Scotland; and therefore, by the "Treaty of Union, are capable to elect or be elected to repreſent any ſhire "or borough in *Scotland*, to ſit in the Houſe of Commons in *Great Britain*;"

It paſſed in the *negative*.——

Accordingly, The 6th December 1708, a new writ was ordered in the room of Lord *Haddo*, who, being the eldeſt ſon of a Peer of that part of Great Britain called Scotland, was declared incapable to ſit in the Houſe. And,

The 18th November 1755, a new writ was ordered in the room of *Charles Douglas*, Eſq; commonly called Lord Douglas, then become the eldeſt ſon of a peer of that part of Great Britain called Scotland.

Beſides theſe, which are permanent diſqualifications of particular claſſes, the Houſe have, in various other inſtances, determined and adjudged with reſpect to the qualifications of the elected. They have adjudged perſons in *execution* not to be eligible.

The 24th March 1625, it appearing to the Houſe, that Sir *Thomas Moncke* was in execution before, and at the time of, his election, a writ was ordered to iſſue for a new choice in his room.

The 22d March 1661, at the election for Leinſter, the *poll was denied* to Mr. *Coningsby*, who was put in nomination for that borough: but he being a priſoner in execution for debt *, and not *eligible*, it was adjudged, which is very obſervable, that the denying the poll to him *did not avoid the election*; and Mr. *Cornwal* and Mr. *Graham*, the other candidates, were duly elected.

The 15th December 1689, on proof of *bribery* in the election for *Stockbridge*, the Houſe *reſolved*, that it was a void election: And reſolved farther,

"That William Montague, Eſq; be diſabled from being elected a burgeſs "to ſerve, in this preſent Parliament, for the borough of Stockbridge."

The 10th November 1707, *reſolved*, That every perſon who by an act of the firſt ſeſſion of the laſt Parliament, intituled, "An Act for the better ſecu-"rity of his Majeſty's perſon and government, and of the ſucceſſion of the "crown of England in the Proteſtant Line," is diſabled, from and after the diſſolution or determination of the ſaid Parliament, to ſit or vote as a member of the Houſe of Commons in any parliament to be thereafter holden, is, by virtue of the ſaid act, incapable of ſitting or voting, as a member of the Houſe of Commons in this preſent parliament.

* The reaſon why a perſon in *execution* is not eligible, is obvious, becauſe ſuch an one is not bailable; conſequently he cannot attend to diſcharge the duty of a repreſentative: Whereas a perſon arreſted on meſne proceſs is admiſſible to bail.

The

The 7th December 1708, *reſolved*, That *Anthony Hammond*, Eſq; being a commiſſioner in the navy, and employed in the out-ports, is thereby *incapable* of *being elected*, or voting as a member of this Houſe.

The 9th June 1733, *reſolved*, That the accepting a commiſſion of Governor or Lieutenant-governor of any fort, citadel, or garriſon, upon the military eſtabliſhment of his Majeſty's guards and garriſons of Great Britain, by any member of the Houſe, being an officer in the army, does *not* vacate the ſeat of ſuch member.

Thus, even where the diſqualification is by ſtatute, the Houſe is the only court where the ſtatute can receive an expoſition, or where any adjudication can be made.

But the following inſtance is of itſelf ſufficient to prove, that the Houſe are, and have been acknowledged to be, the proper and only judges concerning the qualifications of the elected. On

The 19th November 1606, not many years after the caſe of Goodwin, the Speaker produced a note ſent unto him, as he ſaid, by commandment of the Lord Chancellor, containing the names of certain members of the Houſe, diſpoſed and employed by his Majeſty ſince the laſt ſeſſion in ſpecial ſervices, with direction TO KNOW THE PLEASURE OF THE HOUSE, *whether the ſame members to be continued*, or their places ſupplied with others.

In this liſt are the names of Sir Thomas Ridgway, Treaſurer of War, and Sir Humphrey Winch, Chief Baron of Ireland, with others. And,

The 22d November 1606, upon the report, warrants were ordered for the choice of new members in the places of Sir *Thomas Ridgway*, *Humphrey Winch*, &c.

Thus it apperrs from the foregoing precedents, that the Houſe have of antient time exerciſed the ſole right of determining the qualifications of the elected: And that this right has been recognized in one of the moſt arbitrary reigns, by *referring to their pleaſure*, to determine, whether certain members ſhould continue, or their places be ſupplied by others.

It appears likewiſe, that they have exerciſed the right of adjudging and declaring the incapacity of being elected, not only as expoſitors of the written or Statute Law, but even *where the law has been ſilent*, they have adjudged perſons incapable of being elected, from the particular circumſtances of the caſe, and upon general principles of conſtitutional policy.

Thus, it has been ſhewn, that from immemorial uſage, recognized and confirmed by the Statute Law of the realm, the Houſe of Commons have the

ſole right of judicature, in all matters reſpecting elections; and indeed, it is clear, upon the general principles of reaſon and the ſpirit of conſtitutional policy, that ſuch a power ought to be veſted in them, and them only, as eſſential to the ſecurity of publick liberty.

The conſtitution of the Britiſh government, being of a mixed nature, the Houſe of Commons are the body, whoſe peculiar duty it is, to vindicate the liberties of the people, againſt the encroachments either of the Sovereign or of the Nobles.

The better to ſecure the popular intereſt, the Commons are elective; and certain people, being qualified as the law directs, have, at ſtated times, the privilege of electing whom they pleaſe, *being likewiſe qualified by law*, to act as their repreſentatives in parliament.

If any doubt or diſpute ariſes, in reſpect to the qualification either of the electors or the elected, who does the conſtitution point out as the proper judges to decide in ſuch caſes? Moſt certainly, that body only, who are conſtituted as the repreſentatives of the people, ought to determine, upon points which are ſo eſſential to the preſervation of their liberties.

None will be extravagant enough to ſuppoſe, that the people at large, can exerciſe a judicial power of determining the law, with reſpect to their own qualifications, or the qualifications of their repreſentatives: When the electors of a particular county or borough have made their election, they have executed their power; and ſhould any doubt ariſe, either with reſpect to their qualifications, or the qualifications of the elected, they then are parties intereſted in the queſtion, and conſequently cannot be judges. The queſtion is then between them and the reſt of the people; for every member, as has been ſaid, though choſen for a particular place, ſerves for the whole nation.

Nothing therefore can be more abſurd, than to ſuppoſe that they ſhould be judges in their own cauſe, and that their determination, in a matter wherein they are intereſted, and may therefore be preſumed partial, ſhould bind the whole community.

It would be as abſurd to contend, that any of the courts of Weſtminſter, or any other judicature whatever, ſhould be allowed to take cognizance of matters reſpecting the qualifications of electors or elected.

Should any other court be admitted to a concurrent right of judicature in ſuch caſes, it would neceſſarily introduce a claſhing of juriſdiction, and a contrariety of judgment.

Beſides, as it has been ſhewn, that the electors of the particular county

or

or borough, whoſe rights are in queſtion, cannot judge of the matter in diſpute, it would be highly ridiculous to imagine, that any 12 men of thoſe electors, ſhould have a power of determining in ſuch caſe.

To contend for ſuch a power in the courts of Weſtminſter, is not only abſurd, but it is highly dangerous. For——

As an appeal lies ultimately from the judgments of all the courts at Weſtminſter, to the Houſe of Lords, the *Lords would become the ultimate judges with reſpect to the qualifications of electors and elected*, which would apparently give them ſuch *an aſcendancy* over the Commons, as would ruin their independence, overthrow the balance which it has been the provident care of our forefathers to eſtabliſh, and, in the end, deſtroy the rights and liberties of the people.

As this power cannot, nor ought to be lodged in any of the courts at Weſtminſter, ſo neither can it be in the King and Council, or any where elſe, without being attended with the ſame inconveniences and dangers: It can therefore only reſide in the general body of the people, by their repreſentatives; that is, in the Houſe of Commons: Which is, and by the conſtitution can only be, the general court of the people.

The fatal effects of placing ſuch a Power elſewhere, are obvious and certain. Therefore, no man, who is not an enemy to the conſtitution, would wiſh to ſee any other judicature interfere with that of the Houſe of Commons. On the juriſdiction of that Houſe, the liberties of this country depend. Our wiſe and ſpirited anceſtors, in their Addreſs to *James* the 1ſt, declared, that "The privileges, liberties and *juriſdiction* of Parliament, "were the right and inheritance of the ſubject*."

As it has been ſhewn, that the Houſe have, and ought to have, the ſole juriſdiction over their own members, *as ſuch*, that they may puniſh them by expulſion, &c. That they may declare and *adjudge*, who are, and who are not, capable of ſitting in that Houſe.—It will appear, 3dly, That they have exerciſed this right, with reſpect to the late election for Middleſex, in a legal and conſtitutional manner, not only ſtrictly agreeable to the Law and uſage of Parliament, but conformable to the proceedings of the Courts of Juſtice in Weſtminſter Hall, on ſimilar occaſions.

It has been already ſtated, by extracts from the votes, that, upon Mr. Wilkes's being returned after his expulſion, the Houſe *reſolved*, That he *was*, and *is*, *incapable of being elected* to ſerve in this preſent parliament.

Therefore, admitting that his incapacity was not a *neceſſary conſequence* of

* See Ruſh. col. 53.

his

his expulſion, which the Freeholders were bound to take notice of, yet this *expreſs* declaration of incapacity was ſuch as *all the Freeholders of Great Britain* were bound to take notice of. For this, which is but an expoſition of their former reſolutions, is the ſolemn adjudication of a *court of* judicature, on a ſubject wherein they have not only a competent, but the *ſole juriſdiction*. It is therefore as binding, nay, being without appeal, it is, in its effect, more obligatory than a judgment of any of the courts of Weſtminſter, to which every ſubject is bound to ſubmit.

Now, it is a known and eſtabliſhed maxim, that every man is bound to take notice of the law. With what colour then can it be pretended, that the Freeholders of Middleſex had no notice of Mr. Wilkes's incapacity? Ignorance of the fact may, in ſome caſes, be pleaded in excuſe, but ignorance of the law never can.

In truth, however, it is notorious, that they were neither ignorant of the law, nor of the fact. The incapacity of the perſon they thought proper to elect, was, with ſcrupulous caution, ſet forth in the introductory part of the writ, which is always read publickly, previous to the election. Yet, even this caution, which takes away all pretence of want of notice to the Freeholders, has been made the foundation of another objection.

It has been objected, on the authority of Lord *Coke*, that the writ can receive no alteration, but by an act of Parliament. No one will diſpute this authority. But the clear anſwer to this objection is, that the writ, in reality, was not altered. The body, or directory part of the writ, did not vary a jota from the eſtabliſhed form; but the introduction, which declares the cauſe of vacancy, muſt, in the nature of things, be varied according to the different cauſes which occaſion the vacancy.

If the vacancy is occaſioned by the death of a member, it is ſaid, in the room of ſuch an one deceaſed: If it is occaſioned by acceptance of an office, it is ſaid, in the room of ſuch an one, he having accepted ſuch an office: If it is occaſioned by the incapacity of the late member, it ſhould ſay, in the room of ſuch an one *incapable of being elected*. And in like manner with reſpect to other cauſes of vacancy.

It is evident, therefore, that the Freeholders of Middleſex could neither be ſuppoſed ignorant of the fact, or of the law. Having elected a repreſentative again and again, after a legal declaration of his incapacity, in contempt of the juriſdiction of the Houſe, and in direct oppoſition to the Law of the Land, no preſumption could be made in their favour. Such a flagrant miſ-uſer of their franchiſe, at leaſt amounted to a non-uſer; their votes muſt be conſidered as thrown away; and the perſon next upon the

poll, having the majority of legal votes, could only, in point of reaſon and law, be conſidered as duly elected.

Had there been, in this caſe, no line chalked out to direct the determination of the Houſe, yet the neceſſity of the occaſion would have dictated ſuch a deciſion, in order to maintain their own juriſdiction, on which the liberties of the people depend, againſt the contumacy of a ſet of miſtaken perſons, who were inſtigated to betray their own intereſts.

But though the reaſon and neceſſity of the caſe would have ſufficiently juſtified the proceedings of the Houſe, yet they did not act without precedent.

On the 20th of May 1715, in the caſe of the election for the borough of Malden, the poll ſtood thus:

For Serjeant Comyns	215	Mr. Tuffnell	168
Mr. Bramſton	215	Sir Will. Jollyffe	128

Serjeant Comyns having refuſed to take the oath of Qualification, they *reſolved* that his election was void. But what did they farther in this caſe? why, they did not iſſue a new writ! But they conſidered the votes given for the Serjeant as thrown away: And *reſolved*, That Mr. Tuffnell, who had a leſſer number of votes than the Serjeant, was duly elected.

Again, on the 14th of February 1727, and 16th of April 1728, in the caſe of the election for the town of Bedford, the poll ſtood thus:

For Mr. Ongley	465	Mr. Orlebar	240
Mr. Metcalfe	462	Mr. Brace	236

It appearing that Mr. Ongley held an office in the Cuſtoms, and the 12 and 13 W. 3. c. 10. againſt Officers in the Cuſtoms ſitting in Parliament being read, and no ſurrender appearing to have been made of the ſaid office, before the election, the Houſe *reſolved*, That Mr. *Ongley* was incapable of claiming to ſit in Parliament. Therefore, though he had the majority of votes, they conſidered thoſe votes as thrown away: And *reſolved* farther, that Mr. Metcalfe and Mr. Orlebar were duly elected, though Mr. Orlebar had a leſſer number of votes than Mr. *Ongley*.

As it is always to be wiſhed, that there ſhould be a harmony and correſpondence of judgment in the ſeveral courts of judicature throughout the kingdom, ſo, happily in the preſent inſtance, the adjudications of the courts of

of Weſtminſter perfectly agree and correſpond with the determinations of the Houſe of Commons.

In the caſe of the King againſt the Mayor and Aldermen of Bath, the 15 Geo. 2. Mr. *Taylor* brought a *mandamus* to be admitted and ſworn into the office of one of the Aldermen of the city of *Bath*. To which it was returned, that he was not duly choſen; and upon that iſſue being joined, it was tried before Lord Chief Juſtice *Lee*.

It appeared at the trial, that by the charter of the corporation, the Aldermen are to be elected by the Mayor, Recorder and Aldermen, or the major part of them; but it was agreed that the preſence of the Recorder was not neceſſary. It was given in evidence to the jury, that the whole number of electors were *thirty*, of whom *twenty-eight* were lawfully aſſembled for the election of an Alderman:—That for this office there were three candidates, Mr. *Bigges*, who had 14 votes, the ſaid Mr. *Taylor*, who had 13, and Mr. *Kingſton*, who had *one* vote; but that Mr. *Bigges* was not duly qualified to be elected into this office, being neither a freeman of the corporation, nor an inhabitant of the city of *Bath*.

One Biſh, and another witneſs, gave evidence that they made the objection to *Bigges*, at the time of the election; and that the electors, at the time the candidates were propoſed, diſcourſed among themſelves about *Bigges*, as a perſon not qualified.

On the other ſide, there was one witneſs who was preſent at the time, and denied that he heard any ſuch notice given by *Biſh*.

Upon the whole of this caſe, Lord Chief Juſtice Lee, one of the moſt cautious Judges that ever preſided in a court, and whoſe judgments are held in the higheſt eſteem, gave the following direction to the jury.——

That if they were ſatisfied the electors had notice of this want of qualification in *Bigges*, that then the 13 votes for *Taylor* were to be looked upon as ſufficient to determine the election in his favour; and he told the jury, that if they thought the 14 had voted for a perſon, *whom they knew to be unqualified, at the time they voted for him, their votes muſt be conſidered as thrown away, and they were to be deemed as not voting at all*, or as conſenting to the election of *Taylor*: For that their diſſent could no way be regarded, becauſe *their voting for a perſon not qualified, was the ſame as if they had voted for a perſon not exiſting, or dead*. And therefore *they could not be conſidered as voting againſt Mr. Taylor, ſince no man could vote againſt another, but by voting for ſomebody elſe*. So that, on the whole, he conſidered theſe 14 votes as flung away, and of no more avail than if they had not voted at all.

Upon this, the jury found a verdict for Taylor; and a motion was afterwards made for a new trial.

On ſhewing cauſe againſt the motion for a new trial, ſeveral laws were cited in ſupport of Lord Lee's direction to the jury. Among others, the caſe of the *Queen* and *Hugh Boſcawen* was cited, from a note of Mr. *Werg*'s, which was an information, in the nature of a *quo warranto*, againſt Mr. *Boſcawen*, to ſhew by what authority he exerciſed the office of one of the capital Burgeſſes of *Truro*, in the county of Cornwall. It appeared on ſhewing cauſe, that Mr. Boſcawen had 10 votes, and that one Robert D—— had 10 likewiſe; but that no perſon was capable of being elected unleſs he was, at the time of the election, an inhabitant of the borough. Mr. Boſcawen had a houſe near the town, but was not an inhabitant of the town; and though the Court might have granted the information againſt Mr. Boſcawen, on the foundation of an equality of votes, yet, Lord *Parker*, on making the rule abſolute, ſaid, " *He conſidered thoſe* 10 *votes for the unqualified perſon as thrown away, and that the other perſon was duly elected*; from which the reſt of the Court did not diſſent.

The caſe of the *King* and *Withers*, likewiſe, the 8th Geo. 2. while that eminent lawyer Lord *Hardwicke* was Chief Juſtice, was cited. This was an information in the nature of a *quo warranto*, againſt one Withers, for taking upon him the office of one of the capital Burgeſſes of W——.

It appeared, on ſhewing cauſe, that by the ancient uſage of the borough, whenever there was a vacancy of a capital Burgeſs, the Mayor had a right to nominate two perſons, out of which two perſons, and no other, the Mayor and Burgeſſes chooſe one to fill the vacancy.

The defendant Withers and another were nominated by the Mayor, purſuant to the cuſtom. The defendant had five votes, and the other perſon nominated by the Mayor had but *one*. But there were ſix other burgeſſes who inſiſted to vote, and did vote, for a perſon not nominated by the Mayor. The Mayor, however, refuſed to take the poll for the perſon not nominated by him.

The court held, that *the ſix votes for the perſons not nominated by the Mayor were thrown away*, and on that foundation diſcharged the rule.

In the end, upon the ſound reaſoning in Lord Lee's direction, and the authority of theſe caſes, the court were unanimous in refuſing to grant a new trial.

But, independent of theſe great authorities, it is clear upon the principles of common

common ſenſe, that a vote given for a perſon diſqualified cannot be a legal vote. For to conſtitute a legal vote two requiſites are eſſential: 1. That there be a capacity in the elector giving the vote; and 2. That there ſhould be a capacity in the candidate receiving it. Mr. Wilkes, therefore, having no capacity to receive the votes, they were clearly illegal, and muſt be conſidered as thrown away.

Nay, indeed, it has been admitted on the other ſide, that they were thrown away: for, on the queſtion whether the foregoing elections of Mr. Wilkes were null and void, they were, without a diviſion, determined to be null and void; which was, in fact, determining that the votes given for him were thrown away.

Still it is anſwered, on the other ſide, that if they were not good votes *for* Mr. *Wilkes*, they were nevertheleſs good votes *againſt* Mr. *Lutterell*.

On any other occaſion one might be aſhamed to miſpend time in anſwering ſuch futile objections. Did ever any one hear of votes having a *negative* quality? Suppoſe, on Mr. Lutterell's being propoſed, a number of electors had cried out, No! could a *negative* of this kind be conſidered as a vote againſt him? Certainly not. There is no way, as was ſaid by Lord *Lee*, of voting *againſt* a perſon, but by voting *for* ſome other: and if a number of electors might put a negative upon a candidate in ſuch a manner, they might keep a ſeat in parliament vacant as long as they pleaſed; whereby they might deprive not only their fellow electors, but the ſtate, of the aſſiſtance of a member.

It is contended, however, that admitting theſe votes not to be good, yet the election ſhould have been declared void, and Mr. Lutterell ſhould not have been received. To prove this, they ſay it has been held that the voting for a perſon under age, who had a majority, did not make the next perſon elected, who had the minority.

To this it may be anſwered, That every caſe muſt depend on its own circumſtances. Where indeed the incapacity is of ſuch a nature as can only be aſcertained by evidence, there, though the candidate having the majority ſhould appear to have been ineligible, yet perhaps his competitor, having the minority, ſhould not be received; but the election ſhould be declared void. Becauſe it may be preſumed, that had the incapacity been previouſly known, the majority might have made choice of ſome other perſon.

Thus, in the caſe of a minor, if ſuch a candidate be ſo near being of age, that no man can, upon view of his perſon, determine whether he be of age

or not, and if no certificate, or other proof of his minority, be produced, in a caſe of ſuch uncertainty, it would perhaps be too much to ſay that the votes for him were thrown away, and that the next candidate ſhould be admitted.

But if in this caſe any certificate, or other good evidence of his minority, be produced, or if a candidate be ſo young, that his minority is notorious and apparent, in theſe caſes the votes ſhould be conſidered as thrown away, and the next candidate ſhould be received.

The true criterion of diſtinction is, whether the incapacity be or be not notorious of itſelf, and, if not notorious of itſelf, whether there was, or was not, notice of it? If it be notorious of itſelf, or if it appear that the electors had notice of it, in either caſe it muſt be conſidered as an obſtinacy and contumacy in the electors, to vote for a diſqualified perſon; their votes, therefore, muſt be deemed as thrown away, and then the next candidate ſhould be received.

The Houſe of Commons therefore, in ſuch caſes, will uſe their diſcretion; and if they are ſatisfied upon evidence, that the electors had notice of the incapacity of the diſqualified perſon at the time they voted for him, they will reject their votes; and if there be any other candidate, though with a leſſer number of votes, they will, as has been done in the caſes above cited, admit him.

But it is ſaid on the other ſide, that in the caſe of Mr. *Walpole*, who was returned after he was expelled, the Houſe did not receive Mr. *Taylor*, the other candidate, but declared the election void.

True; but this caſe is by no means applicable to that of the Middleſex election. For though Mr. Walpole was returned after expulſion, and though, as has been contended, the incapacity was the neceſſary effect of the expulſion, yet in as much as this was the firſt and only inſtance in which the electors of any county or borough had returned a perſon expelled to ſerve in the ſame parliament, and the electors might be preſumed not to have due notice of the effect of expulſion, the Houſe gave them an opportunity to correct their error, by giving expreſs notice, and by reſolving, that *he was* thereby *incapable* of being elected, and at the ſame time declaring the election void.

It may be ſaid, indeed, that by their voting for a perſon ineligible, a right attached, by operation of law, in Mr. *Taylor*. But a right of this kind in an individual, ſtanding in competition with the rights of ſo many electors, and the law, with regard to the effect of expulſion, having never been before declared, it was proper and juſt in the Houſe to give the electors, who had voted

voted for an incapable candidate, an opportunity of making a new choice, after the law creating the incapacity had been expounded.

But this their reſolution leaves no room to doubt what part they would have taken, if, upon a ſubſequent re-election of Mr. Walpole, there had been any other candidate in competition with him. For, by their vote, they could have no other intention than to admit ſuch other candidate; otherwiſe their vote would amount to a reſolution that the ſeat ſhould remain vacant during that parliament.

But how unlike to this is the preſent caſe! In the preſent caſe, the Houſe, with the ſame moderation, explained the effect of the expulſion, by declaring that Mr. Wilkes *was* thereby *incapable* of being elected. Still, however, after the fulleſt notice, after he had been again and again declared incapable of being elected, they obſtinately perſiſted in chooſing him.

Therefore, as there was not the leaſt colour for preſuming that they had not notice of his incapacity, and as Mr. *Lutterell* ſtood next upon the poll, the Houſe could not, without injuſtice to him, without betraying their own juriſdiction, without violating the precedents of Parliament, and the correſponding determinations of the Courts at Weſtminſter; in ſhort, without oppoſing the principles both of reaſon and law, they could not act otherwiſe than they did.

In truth, there was no alternative but to admit Mr. *Lutterell*, or to refuſe iſſuing a new writ. To have rejected Mr. *Lutterell*, after the law in ſuch caſes had been expounded, would have been to have denied him his right: To have refuſed iſſuing a new writ, would have been a violation of the rights of the Freeholders. By arbitrarily keeping ſeats vacant, the Houſe may be purged, as in Oliver's time, to any degree a miniſter thinks proper: And this mode of proceeding, which ſome pretended patriots affect to prefer, would have been, as has been ſaid, not only unjuſt with regard to Mr. *Lutterell*, but dangerous and unconſtitutional with reſpect to the people.

Nevertheleſs it is pretended on the other ſide, that though the rejecting the perſon returned, and receiving the other candidate, might have been right, had the perſon rejected been diſqualified by act of Parliament, yet it is otherwiſe, as he is diſqualified only by the judgment of the Houſe. By this means, they contend, the franchiſes of the electors are taken away, which nothing but an act of Parliament can do; for that the Houſe, being but one of the three branches of the legiſlature, cannot make laws to bind the people; and that though their orders and reſolutions are binding upon themſelves, yet they do not operate without doors.

In anſwer to this, it is to be obſerved, that though the Houſe of Commons, in their *legiſlative* capacity, as one only of the three branches of the Legiſlature, cannot, as has been ſaid, *make* laws to bind the people, yet it is to be remembered, as was ſtated in the beginning, that they have a *judicial*, as well as a *legiſlative* capacity, and it is in their *judicial* capacity that they take cognizance of elections. Conſidered therefore as a *Court of Judicature*, their adjudications are as obligatory as the judgments of any other court whatever; nay, more ſo, as has been intimated, becauſe they are without appeal.

To ſhew, however, that the judgments of Parliament are not binding without doors, they are extravagant enough, on the other ſide, to cite the caſe of the King and Queen againſt *Knollys* *, commonly called *Lord Banbury*'s caſe, which was ſhortly thus:

Charles Knollys, Earl of Banbury was indicted for the murder of *Capt. Lawſon*, by the name of *Charles Knollys*, Eſq; and this indictment was removed into the *King's Bench*, where the defendant pleaded in abatement, that he was a Peer. To which it was replied, that the defendant had *petitioned* the Lords in Parliament, to be tried by his Peers; upon which the Lords, by an order of their Houſe, diſallowed his peerage, and diſmiſſed the petition. To this replication there was a demurrer, and a joinder in demurrer. Notwithſtanding this order of the Lords, however, judgment was given for the defendant, and the indictment abated.

But the grounds on which the Court reſted their opinion, as expreſſed by Lord Holt, was that the *order* of the Lords was not any determination, for that the cauſe was not properly before them: It was not properly before them, becauſe the petition was preferred to the Lords, in *the firſt inſtance*, whereas it ſhould have been preferred to the King, and from his Majeſty have been referred to the conſideration of the Lords: So that the petition to the Lords, was *coram non judice*.

This caſe, therefore, is not applicable to the caſe in queſtion in any point whatever. For, in Lord *Banbury*'s caſe, the reaſon, it is ſeen, which influenced the court, was, that the proceeding coming irregularly before the Houſe of Lords, their order thereon was not a *judgment* of the Houſe. From whence it is to be inferred, that if, in this caſe, the Lords had acted judicially, in a matter regularly laid before them, the court would, and they certainly muſt, have taken notice of their *judgment*. But, in the preſent caſe, the Houſe of Commons acted as a *Court of Judicature*, in a cauſe regularly before them; their declaration therefore was the adjudication of the court; and the

* Salk. 47, 509, 512. 3 Salk. 242. Carth. 297. Comb. 273. Skin. 336, 517. Caſ. T. R. 55. Holt 530.

adjudi-

adjudication of a court having competent jurisdiction, more especially of a court without appeal, is the *Law of the Land.*

It has already been observed that there are in this kingdom, as in most others, divers laws for the administration of government.

Will any one say, that the *Common Law* is not as binding as the Statute Law? that the *customs of particular places* are not of equal force with the Statute Law? And will any one say, that the *Law of Parliament* is of less force and efficacy than the Statute Law? Are not all equally the *Law of the Land?* And does not the jurisdiction of the House of Commons, in matters of elections, stand upon as firm a footing as the jurisdiction of any other court in the kingdom? nay, has it not been recognized again and again by the Statute Law?

If it be asked when, and how they acquired this jurisdiction; the answer is, That they gained it at the same time, and by the same means that they gained their right of impeaching the greatest personages in the land; at the same time, and by the same means, that they acquired the right they exercise with regard to money bills, and other undoubted privileges. In short, their jurisdiction in this respect, which is confirmed by immemorial usage, is as ancient as the *Common Law*, and must be so deemed, for no written law can be produced which shews the commencement of the institution: It is coeval with the constitution, and without such a jurisdiction the House of Commons, as has been shewn, could not exist as an independent body: And if this jurisdiction is questioned, all their other privileges may, on as good a foundation, be disputed; since these, *together with many privileges of the other House*, can only be supported by immemorial usage.

As to the pretence that the House, by the exercise of this jurisdiction, have taken away the franchises of the electors, which nothing but an act of Parliament can do, this insinuation is altogether fallacious.

Is the prohibiting of them from exercising their franchise against law the same thing as depriving them of it? Is it not necessarily understood in the exercise of every franchise, that it shall not be used contrary to the rules of law?

In the present instance, they exercised it so clearly contrary to the rules and reason of the law, that, independent of the declaration of incapacity by the House, the sheriff might, on the authority of the case of *Leimster*, above cited, have even *refused to have taken any poll* for Mr. *Wilkes*, and even that would not

have avoided the election; but any other candidate, having a majority of legal votes, would have been duly elected.

But how does the determination of the Houſe deprive the electors of their Franchiſe? No one diſputes their right: All that is contended is, that they have exerciſed their *right* INEFFECTUALLY. Their right, as has been ſaid, is to vote for whom they pleaſe, *being duly qualified*, to repreſent them. But they have wilfully and obſtinately, with their eyes and ears open, voted for one diſqualified, and of whoſe incapacity they were not only bound by law to take notice, but of which notice was actually and repeatedly given them.

Their votes therefore, on this occaſion, muſt be conſidered as not given at all. But ſtill, though, in ſtrictneſs of law, perhaps, a wilful miſuſer of a franchiſe is a cauſe of forfeiture, yet no one contends that their franchiſe is hereby forfeited. No one means to take away their franchiſe: They have ſtill the right of voting, on any future occaſion, for whom they pleaſe, being duly qualified. But ſurely no one will contend that the electors of Middleſex are above the law; and that their Will is to over-rule the ſenſe of the people at large, declared by their repreſentatives.

But it has been ſaid, and an obſolete act of Hen. the 4th has been cited, which declares, that "All elections ſhall be free without being interrupted "by the *Pope*, or by *commandment of the King*;" much leſs, ſay the objectors, ought elections to be interrupted *by commandment of the Houſe of Commons.*

One would ſuſpect, by the levity of ſuch arguments, that they who uſe them really meant to betray the cauſe which they affect to ſupport. That Elections ſhould be free, no one will diſpute; but the freedom here ſpoken of, is a freedom limited by law.——That the *Pope* ſhould interfere with Elections, we have no reaſon to fear: as little reaſon have we to apprehend, that our Sovereign will interrupt the free courſe of Elections. Nevertheleſs, it was provident in our forefathers to declare any commandment of the King to be illegal; for ſhould a commandment of that kind be admitted, it would directly tend to deſtroy the independence of the Houſe of Commons; *ſo would the influence of any other power whatever.* But the objectors are to learn, that the *reſolution*, or the *commandment*, if they chooſe to call it ſo, of the Houſe of Commons, is not againſt law, but declaratory of the law of the land. They are the proper and ſole judicature, entruſted with the expoſition of the law in ſuch caſes.

When the juriſdiction of the Houſe, however, can no longer be diſputed, attempts are made to alarm us with the dreadful conſequences, which, as ſome affect to apprehend, may enſue from it. At this rate, ſay they,

they, the Houſe of Commons may declare that no freeholder under 10 *l.* *per annum* ſhall vote at an election for a knight of the ſhire.

If they were ſerious in this apprehenſion, it might eaſily be removed, by aſſuring them that the Stat of Hen. the VIth having fixed the qualification of the freeholders at 40 *s.* *per annum*, it is not in the power of the Houſe of Commons, nor of any judicature whatſoever, to alter it: The *Legiſlature* only can enlarge or diminiſh the qualification.

There muſt, in all caſes, ultimately be a power of judicature ſome where, without appeal; and wherever the conſtitution has thought proper to veſt it, it is not ſuppoſed that it will, or ever can, be exerciſed againſt the expreſs letter of the law.

Upon the whole, whether the juriſdiction of the Houſe, with reſpect to Elections, be examined on the foundation of parliamentary precedents and authorities of law, or on the general grounds of reaſon and conſtitutional policy, it is evident that they have, and ought to have, the ſole and excluſive right of judicature in all ſuch caſes: that it cannot, conſiſtent with the preſervation of public liberty, be lodged an where elſe; and that, in the inſtance in queſtion, they have exerciſed this right not only according to the eſtabliſhed law and uſage of Parliament, but in conformity with the adjudications of the Courts at Weſtminſter, on the like occaſions.

It is ſcarce to be credited, that in theſe days, which we boaſt of as enlightened, the public ſhould be ſo far miſled as to queſtion the exerciſe of a juriſdiction, on which their own welfare and ſecurity depends.

But what ſhall be ſaid of thoſe, who have employed every artifice thus to miſlead and irritate the minds of the public, and who induſtriouſly augment the difficulties of adminiſtration, by obliging the miniſtry to pay that attention to their intereſted oppoſition, which might be better employed in improvements for the public good!

If Lord *Coke* had reaſon to lament that "much time was ſpent in Parliament concerning the right of Elections, &c. which might be more profitably employed for the public good *," how would he have lamented, had he lived in theſe days, to have ſeen *one Election* only conſume ſo conſiderable a portion of a long ſeſſion of Parliament; and to have known, that this deplorable waſte of time was occaſioned by the oppoſition of a party, who laboured to force a member upon Parliament *againſt law*, whom they themſelves had cauſed to be expelled!

* 4 Inſt. 49.

What

What fruits are to be expected from ſuch a flagrant inconſiſtence of conduct?

However ſtrongly ſuch a party may be united at preſent, by a common intereſt, the purſuit of profit and power, yet when they come to a diſtribution of that power and that profit, how ſoon would they divide! Their different views, diſpoſitions and paſſions, would quickly ſet them at variance; new factions would be formed; new diſcords would ariſe; and the public intereſt be ſacrificed to private views and reſentments.

Theſe conſequences are obvious to the diſcerning and diſpaſſionate part of the people, who, unhappily for the affairs of mankind, ſeldom compoſe a majority.

It is to be hoped, however, that, before it is too late, the public judgment will be corrected. They will then find, that the perſons whom they have been perſuaded to conſider as the invaders of their rights, are in truth the aſſertors and protectors of thoſe rights; and they will then know, in what eſtimation to hold thoſe, who, by every unwarrantable artifice, have laboured to inflame their minds with repreſentations of imaginary grievances, at the very time that, by a ſelfiſh oppoſition, they were retailing real miſery upon them and their poſterity.

FINIS.